

Visible targets

The case for equitable briefing

Kate Eastman SC

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Introduction

Why are women invisible in the courts?

What should be done to provide women barristers with the same opportunities as their male counterparts?

The women of the New South Wales Bar are among the best educated, qualified and experienced lawyers in Australia. Our women members include university medallists, and those holding multiple postgraduate degrees including doctorates from the world's premier tertiary institutions. Women barristers have wide ranging experience in science, business, international affairs, health, teaching, government and academia.

Purpose of this research

This report builds on the work of the New South Wales Bar Association's Equitable Briefing Working Group *Review of the Application in New South Wales of the Equitable Briefing Policy of the Law Council of Australia* (August 2015).¹

The purpose of this research is to examine whether targets are required and the nature of the target for a revised Law Council Equitable Briefing Policy adopted by the Law Council of Australia on 18 June 2016.²

Key findings

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- Women barristers are not appearing in numbers equal to the proportions of women at the Bar in civil and commercial matters.
 - Women barristers are more likely to be briefed by government agencies and small firms in civil and commercial matters.
 - Women barristers are appearing regularly and in numbers significantly above the proportions of women at the Bar in criminal matters.
 - The overall pool of women barristers appearing in the courts is small compared to the total number of women barristers. This means that many women barristers are not appearing regularly and their appearances are infrequent.
 - The equitable briefing initiatives to date have had little impact on briefing practices in the civil and commercial areas.
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In summary, a review of the available data confirms the anecdotal evidence about where, when and how frequently women barristers appear in court, who is briefing women and the areas of practice.

¹ http://www.nswbar.asn.au/docs/webdocs/eb_report_01092015.pdf

² http://www.lawcouncil.asn.au/lawcouncil/images/National_Model_Gender_Equitable_Briefing_Policy_-_June_2016.pdf

Methodology

The review covers a 17 month period between 1 July 2014 and 30 October 2015. The review has involved examining around 5000 judgments published on line to identify those matters where barristers appeared. The data is collated from reviewing the judgments published on www.austlii.edu.au for each particular court during the period. The review covered the following jurisdictions:

- High Court of Australia (62 decisions)
- New South Wales Court of Appeal (490 decisions)
- New South Wales Court of Criminal Appeal (455 decisions)
- Supreme Court of New South Wales (2128 decisions)
- Full Court of the Federal Court of Australia (250 decisions)
- Full Court of the Family Court of Australia (252 decisions)
- Federal Court of Australia (matters in the New South Wales Registry with NSD matter number) (676 decisions)

All of the data reviewed is publically available.

Because the focus was on barristers' appearances, 4313 judgments were reviewed. The following judgments were excluded for the purpose of counting barristers' appearances:

- matters where no barrister appeared;
- matters decided on the papers without an appearance by a barrister such as a costs application after a substantive hearing
- if the judgment was described as 'restricted' and no appearance was recorded for a barrister's appearances.

The gender of the barrister was identified either by the title Mr, Mrs, Ms etc recorded in the judgment or where gender was not identified by title, a search was conducted of relevant Bar Association registers. In some cases it was not possible to verify the gender of the barrister appearing.

Limitations of the research

In identifying when women appeared in court, it is accepted that there are limitations with the model used. The limitations are:

- the inability to make any assessment of the complexity of a matter; and the role of women counsel in the preparation of matter;
- the inability to record the hours in court. It was possible only to capture data by reference to days;
- the inability to identify matters which were part heard and settled before trial and judgment. However, it is unlikely that women barristers are briefed in matters that settle in more significant numbers than those matters that proceed to hearing. If it is the case that women are briefed in matters that are more likely to settle, this raises the question of whether women barristers are more effective at settling matters or more likely to be briefed in matters that are less likely to proceed to a final hearing.

Background

In 2009, the Law Council of Australia published *Beyond the Statistical Gap: 2009 Court Appearance Survey*.³ The three key findings were:

- Men and women appeared in the survey population in exactly the same gender proportion as they existed in the Bar population (81% men and 19% women);
- When appearing in matters resulting from briefings by private law firms, appearances by men were substantially higher than those by women barristers than would be expected based on the proportions that they exist in the Bar population (86% men and 14% women); and
- Average appearance time for men was significantly longer than that for women (3.8 hours men; 2.8 hours women).

The *Beyond the Statistical Gap: 2009 Court Appearance Survey*⁴ found that even with the rise in the number of women coming to the Bar, women were not appearing in court as regularly and proportionately as their male counterparts. The Survey recorded:

- in the New South Wales Supreme Court 9.9% of appearances before the Court of Appeal were by women, but 27.8% of appearances before a Master were by women.
- in the Federal Court 5.8% of appearances by Senior Counsel were by women.
- the average length of hearing for a male Senior Counsel was 119.7 hours, compared to 2.7 hours for a woman Senior Counsel.
- In the Federal Court the average length of hearing for male counsel appearing as Junior to Senior Counsel was 223.6 hours, compared to 1.4 hours for women Junior Counsel in the same role.⁵

The *Survey* noted that there were three strategic objectives of the Strategy for Advancing Appearances by Female Advocates in Australian Courts (**Strategy**):

- Promote an increase in the proportion of women going to, remaining and advancing at, the bar;
- Promote an increase in the number and quality of briefs given to female barristers, particularly by private law firms; and
- Promote discussion of, and educate the legal profession about, the issues contributing to shorter appearance times of female barristers in certain jurisdictions.

One of the strategies included: *10. Further qualitative research be conducted into the benefits experienced by other entities in briefing female barristers.*

³ http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB_3-AttachmentA.PDF

⁴ http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Beyond%20the%20statistic%20gap%20-ItemB_3-AttachmentA.PDF

⁵ http://www.womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf

Since 2009, there has been no qualitative research conducted into the benefits experienced by ‘other entities’ briefing female barristers.

The absence of research means that there is great reliance on anecdotal evidence and disparate statistics. For example, women graduate from law schools in numbers *greater* than their male counterparts, but women lawyers are not selecting the Bar as a profession. Women under the age of 30 represent a tiny proportion of barristers. For example, in New South Wales in June 2016 there are 7 women in their 20s at the Bar. This represents 0.3% of the Bar. There are 32 men in the same age group representing 1.36% of the Bar.⁶ This reveals some ‘pipeline’ issues for the number of women at the Bar over the long term. These numbers are consistent with the Women Lawyers Association (NSW) research published in the *Career Intentions Survey*.⁷

Further, journalist Jessica Irvine published an article in *The Age* and *The Sydney Morning Herald* on 9 June 2016 that reported the largest gender pay gap in Australia was for barristers with a pay gap of 184%, Australia wide. The average male barrister declaring a taxable annual income of \$169,000 and the average female barrister \$60,000. Adjusting for average working hours the pay gap is 141%.⁸

What has happened since 2009: Comparing NSW Barristers by gender 2009 to 2015

	2009	March 2015
New South Wales	<ul style="list-style-type: none"> • 2107 barristers • 1730 (82.2%) men • 377 (17.8%) women.⁹ 	<ul style="list-style-type: none"> • 2267 barristers • 1792 (79%) men • 475 (21%) women.
New South Wales – Senior Counsel/Junior Counsel	<ul style="list-style-type: none"> • 303 male SCs/QCs (14.4%) • 19 female SCs/QCs (0.9%) • 1427 male Junior Counsel (68.7%) • 358 female Junior Counsel (15.9%)¹⁰ 	<ul style="list-style-type: none"> • 336 male SCs/QCs (14.8%) • 37 female SCs/QCs (1.6%) • 1456 male Junior Counsel (64.2%). • 438 female Junior Counsel (19.3%).

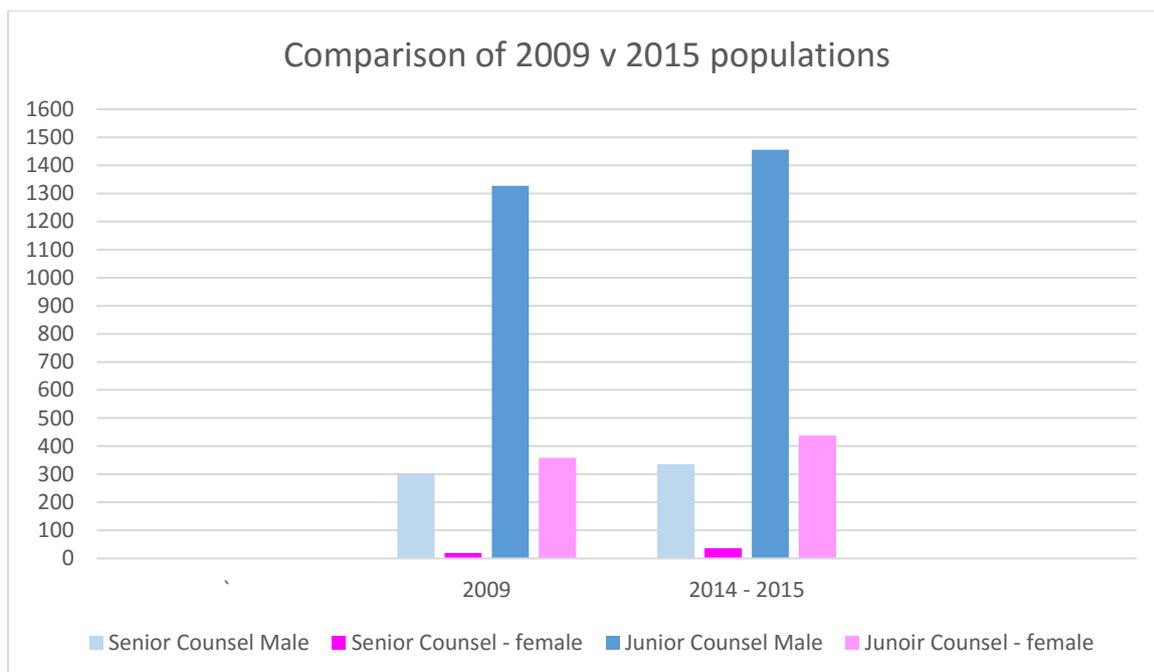
⁶ <http://www.nswbar.asn.au/the-bar-association/statistics> (accessed June 2016)

⁷ <https://womenlawyersnsw.org.au/wp-content/uploads/Career-Intentions-Survey-Final-Report-2015-FINAL-WEB.pdf>

⁸ <http://www.theage.com.au/comment/australias-top-10-jobs-with-the-biggest-gender-pay-gap-revealed-20160608-gpezg8>; research according to an analysis of 2013-14 raw figures by Ben Phillips, principal research fellow at the Australian National University's Centre for Social Research and Methods.

⁹ <http://www.nswbar.asn.au/circulars/2010/oct/scstats.pdf>

¹⁰ <http://www.nswbar.asn.au/circulars/2010/oct/scstats.pdf>



In New South Wales, when the proportions are broken down further by age and gender, the largest cohort is male barristers over the age of 60. This group represents close to 30% of the entire Bar. There are more male barristers over the age of 60 in practice than there are of all women at the Bar in New South Wales. The second largest cohort is male barristers aged 50 – 59 years. In short, male barristers over the age of 50 represent about 50% of the entire Bar.

Given these statistics, the Bar is likely to see changes in its demographics over the next 10 – 15 years as this group transitions from active practice.

National figures

	2009	March 2015
National numbers	<ul style="list-style-type: none"> • 5487 barristers • 4429 (81%) male • 1058 (19%) female. ¹¹ 	<ul style="list-style-type: none"> • 6005 barristers¹² • 4616 (76.86%) male • 1389 (23.14%) female
National numbers – Senior Counsel/Junior Counsel	<ul style="list-style-type: none"> • 774 male SCs/QCs • 53 female SCs/QCs • 3655 male Junior Counsel. • 1005 female Junior Counsel. ¹³ 	<ul style="list-style-type: none"> • 752 male SCs/QCs • 91 female SCs/QCs • 3684 male Junior Counsel. • 1298 female Junior Counsel

¹¹ Law Council's 2009 *Beyond the Statistical Gap: 2009 Court Appearance Survey*

¹² National statistics from Australian Bar Association Statistics 2015

¹³ Law Council's 2009 *Beyond the Statistical Gap: 2009 Court Appearance Survey*

Appearances

High Court

According to the research done by Vinod Mishra and Russell Smyth published in *Barrister Gender and Litigant Success on the High Court of Australia*, in the calendar year 2009,¹⁴ women appeared in 19 of the 40 matters heard by the High Court representing 48% of all cases. As for speaking roles, there were 3 women in speaking roles representing 8% of all matters. This excludes special leave to appeal applications.

In the 17 month period between 1 July 2014 and 30 October 2015, the High Court delivered 62 judgments in which 402 counsel appeared. The review excluded special leave applications.

Women barristers appeared in 37 of the 62 matters representing appearances in around 60% of matters.

The breakdown of the proportion of gender and seniority of the 402 counsel is as follows:

Men		Women	
82% (330)		18% (72)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
46% (185)	36% (145)	3.7% (15)	14% (57)

Women senior counsel

- Of the 15 women senior counsel appearing in High Court matters, 8 of these women were second silks and lead by a more senior male silk.
- Of the 15 women senior counsel appearing 8 were New South Wales based.
- Seven women appeared in a lead role (1.74% of all counsel appearances).
- Women senior counsel appeared in a lead role in 3 criminal appeals, 1 tax appeal, 1 admin law, 1 intervening for a State)
- The number of male junior counsel appearing with women senior counsel was 4.

Women junior counsel

- Of women junior counsel appearing in the High Court all but one appeared as a junior to a senior counsel. One women junior counsel appeared alone and she was appearing pro bono.
- The majority of women junior counsel were junior to a male senior counsel. One women junior appeared with a woman senior counsel.

¹⁴

https://business.monash.edu/data/assets/pdf_file/0003/339546/barrister_gender_and_litigant_success_on_the_high_court_of_australia.pdf at Table 2.

Women counsel appeared most frequently in constitutional matters where the Attorneys-General intervened in the appeals.

The Commonwealth Solicitor General appeared in 10 matters. He had 10 male juniors and 5 female juniors.

The NSW Solicitor General appeared in 7 matters. He had 2 male juniors (both SC) and 7 female juniors. He appeared with a woman junior 100% of the time.

Solicitors briefing women in the High Court:

Briefing entity	Number of times briefing women in the High Court
PRIVATE FIRMS	
Large Commercial firms (including pro-bono matters)	9
Small – medium firms	17
NGOS/CLC/Legal Aid	5
GOVERNMENT BRIEFING AGENCIES	
NSW Crown Solicitor	8
WA State Solicitor	7
SA Crown Solicitor	5
Australian Government Solicitor (AGS)	4
Crown Law (QLD)	3
Victorian Government Solicitor	2
Solicitor for NT	1
Australian Human Rights Commission	1
Solicitor for Commissioner of State Revenue	1
DPP (NSW)	4
DPP (QLD)	1
DPP (SA)	1
	TOTAL :38

NEW SOUTH WALES

New South Wales Court of Appeal

In the period 1 July 2014 to 30 October 2015, the Court of Appeal delivered 490 judgments. In these 490 decisions, 1462 counsel appeared.

At least one woman counsel appeared in 167 matters representing 34% of matters.

Matters where senior counsel appeared (536), women senior counsel appeared in 4.48% of all senior counsel appearances. This is significantly less than the proportion of women senior counsel (being around 9.5% of all senior counsel at the relevant period).

The breakdown on gender of the 1462 counsel is as follows:

Men		Women	
86% (1258)		14% (204)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
35% (512)	51% (746)	1.64% (24)	12.3% (180)

New South Wales Court of Criminal Appeal

In the period 1 July 2014 to 30 October 2015, the NSWCCA delivered 455 judgments in which 973 counsel appeared.

At least one woman counsel appeared in 292 matters representing 64% of matters.

In matters where senior counsel appeared (328), women senior counsel represented 37.5% of all senior counsel appearances. This is significantly higher than the proportion of women senior counsel (being around 9.5% of all senior counsel at the relevant period).

Men		Women	
61.5% (598)		38.6% (375)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
21.1% (205)	40.4% (393)	12.6% (123)	26% (252)

Supreme Court

In the period 1 July 2014 to 30 October 2015, the NSWSC delivered 2128 judgments in which 5065 counsel appeared. At least one woman appeared in 651 matters representing 12.9% of matters.

Men		Women	
84% (4251)		16.1% (814)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
24.3% (1230)	59.6% (3021)	1.9% (97)	14.2% (717)

FEDERAL COURTS

Full Court of the Federal Court

In the period 1 July 2014 to 30 October 2015, the Full Court of the Federal Court delivered 250 judgments. In these 250 decisions, 835 counsel appeared.

At least one woman counsel appeared in 155 decisions representing 62% of all matters.

In matters where senior counsel appeared (325), women senior counsel appeared 22 times, representing 6.77% of senior counsel appearances.

Of 22 women senior counsel appearances, 15 were New South Wales based.

Men		Women	
84.4% (705)		15.6% (130)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
36.3% (303)	48% (402)	2.6% (22)	13% (108)

Solicitors briefing women in the Full Court of the Federal Court:

Briefing entity	Number of times briefing women in the Full Court
PRIVATE FIRMS	
Small – medium firms	45
Large Commercial firms	21
GOVERNMENT BRIEFING AGENCIES	
Australian Government Solicitor	25
Australian Taxation Office	8
Australian Securities and Investment Commission	6
Commonwealth Director of Public Prosecutions	2
WA State Solicitor	2
Australian Human Rights Commission	2
Crown Law (QLD)	1
Australian Competition and Consumer Commission	1
NSW Crown Solicitor	1
OTHER	
Direct (pro bono)	7
NGOS/CLC/LEGAL AID/Union	7
Unidentified	2

Federal Court (NSD matters)

In the period 1 July 2014 to 30 October 2015, the Federal Court delivered 676 judgments. In these 676 decisions, 1697 counsel appeared.

At least one woman counsel appeared in 195 matters, representing 29% of all matters.

As a proportion of 482 senior counsel appearances, women senior counsel comprised appeared 34 times or 7.1% of all senior counsel appearances.

Men		Women	
85% (1442)		15% (255)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
26.4% (448)	58.6% (994)	2% (34)	13% (221)

Full Court of the Family Court

In the period 1 July 2014 to 30 October 2015, the Full Court of the Family Court delivered 252 judgments (Australia wide). In these 252 judgments, 474 counsel appeared. At least one woman counsel appeared on 112 matters represented by 44.40% of all matters.

In matters where senior counsel appeared (87), women senior counsel represented 16% of all senior counsel appearances.

Of the 14 women senior counsel, 1 was from NSW.

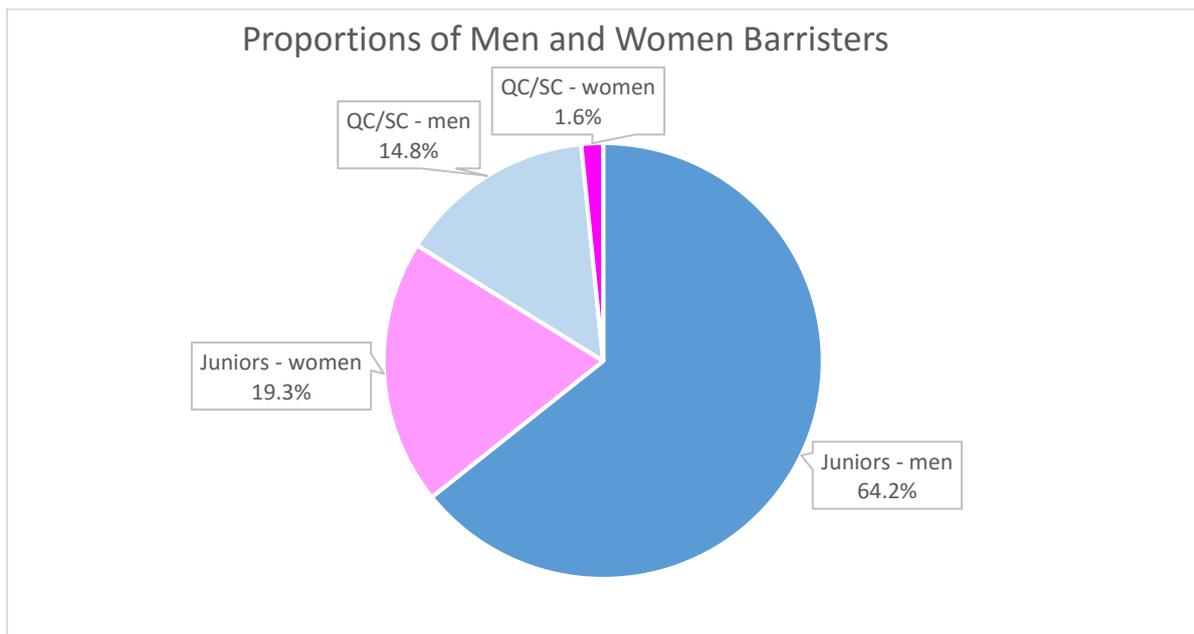
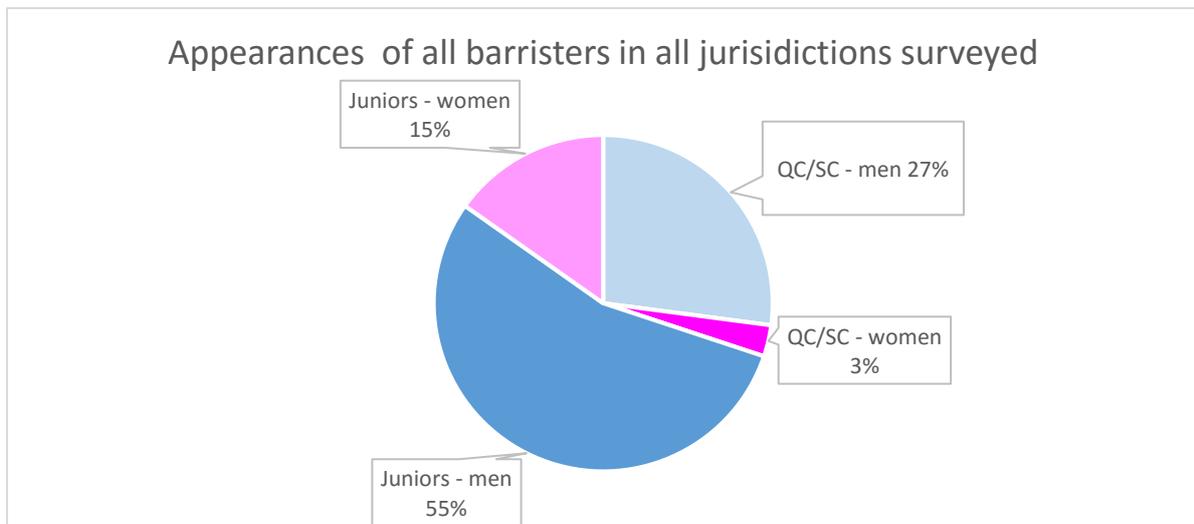
Men		Women	
71.7% (340)		28.3% (134)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
15.4% (73)	56.3% (267)	3% (14)	25.3% (120)

TOTALS

Taking all jurisdictions surveyed, 4313 judgments were counted with a total of 10,908 counsel appearing.

The gender breakdown is as follows:

Men		Women	
81.8% (8924)		18.2% (1984)	
Senior Counsel	Junior Counsel	Senior Counsel	Junior Counsel
27% (2956)	55% (5968)	3% (329)	15% (1655)



When the total of all appearances are taken into account, the data reveals that Senior Counsel are briefed beyond their numerical proportions. For men the difference is 13% almost double the actual proportion. For women Senior Counsel it is 1%.

For junior counsel, both men and women appear in a lower percentage of matters compared to their proportion at the Bar. For the purpose of this Survey which has focused on appellate level courts in the High Court, Court of Appeal, Court of Criminal Appeal, Full Court of the Federal Court and Full Court of the Family Court, this is not surprising or unexpected.

A quick examination of decisions at the District Court, Local Court, NSW Civil and Administrative Tribunal and Federal Circuit Court suggest that Senior Counsel do not appear so frequently.

When compared against the proportion of women as a whole at the NSW Bar at the relevant period:

Women Barristers in NSW represented 21% of all barristers	Percentage based on women appearing
OVER	
New South Wales Court of Criminal Appeal	38.5% (+17.5%)
Full Court of the Family Court ¹⁵	28.27% (+7.27%)
BELOW	
High Court of Australia	17.5% (- 3.5%)
Full Court of Federal Court ¹⁶	15.57% (- 5.43%)
New South Wales Supreme Court	16% (- 5%)
Federal Court in NSD matters	15% (- 6%)
New South Wales Court of Appeal	14% (- 7%)

For all of these courts combined, the appearances for women counsel was 18.2% (- 2.8%)

¹⁵ Appearances based on national appearances and not limited to New South Wales.

¹⁶ Appearances based on national appearances and not limited to New South Wales.

Women Senior Counsel 10% of all Senior Counsel in NSW	Percentage based on women Senior Counsel appearing of all Senior Counsel appearances
OVER	
New South Wales Court of Criminal Appeal	37.5% (+ 27.5%)
Full Family of the Family Court ¹⁷	16% (+ 16%)
BELOW	
New South Wales Supreme Court	7.3% (-2.7%)
High Court of Australia	7% (-3%)
Full Court of Federal Court ¹⁸	6.7% (-3.3%)
New South Wales Court of Appeal	4.5% (-5.5%)
Federal Court in NSD matters	2% (-8%)

For all of these courts combined, the appearances for women counsel was 8.6% (-1.4%)

¹⁷ Appearances based on national appearances and not limited to New South Wales. For NSW, there was one women senior counsel appearing. The data available from the NSW Bar Association suggests that women senior counsel do not list family law as a primary area of practice.

¹⁸ Appearances based on national appearances and not limited to New South Wales.

Junior Counsel 23% of all Junior Counsel	Percentage based on women Junior Counsel appearing of all Junior Counsel appearances
OVER	
New South Wales Court of Criminal Appeal	39% (+16%)
High Court of Australia	27.8% (+4.8%)
Full Court of the Family Court ¹⁹	25% (+2%)
BELOW	
Full Court of Federal Court ²⁰	21% (-2%)
New South Wales Court of Appeal	19.4% (-3.6%)
New South Wales Supreme Court	19.2% (-3.8%)
Federal Court in NSD matters	13% (-10%)

For all of these courts combined, the appearances for women counsel was 21.7% (-1.3%)

¹⁹ Appearances based on national appearances and not limited to New South Wales.

²⁰ Appearances based on national appearances and not limited to New South Wales.

Trends

There is a very significant difference in the appearances of women counsel in criminal and civil matters. In criminal matters, women counsel (both senior and junior) regularly appear to prosecute, defend and conduct the appeals in criminal matters. In civil matters, the appearance of women at the appellate level is rare. Women junior counsel are usually led and do not appear in lead or speaking roles. The pool of women senior counsel appearing at the appellate level is small. Many of the women senior counsel appeared without a junior in appeals and in some cases, appeared against unrepresented litigants.

For all appellate level matters, women counsel are more likely to be briefed to appear for a government agency. The large commercial law firms who brief women counsel for appellate level generally brief women counsel on behalf of their government clients or for pro bono matters. The exception appears to be in intellectual property litigation where women counsel are briefed to appear for non-government clients.

At the trial level, in the Supreme Court women are briefed by a range of firms and government agencies.

A review of the data indicates that women are appearing in trials of a shorter duration compared to men which suggests that the 'hours in court' data collected in 2009 for the Court Appearance Survey continues to reflect the experience of women counsel.

Anecdotally, there is a view that women are not being briefed in large commercial matters. The view is consistent with the data, perhaps with the exception of women appearing in taxation disputes. However, the data also indicates that the male counsel briefed in large commercial matters are confined to a relatively smaller proportion of male senior and junior counsel. The data does not suggest that there is a deep or wide pool of men who are regularly briefed in large commercial matters.

As noted above one of the limitations of this approach is that the data does not identify matters commenced but settled because of mediation or other means prior to trial or the publication of reasons.

In summary, there have been no significant improvements since the 2009 Survey and arguably has deteriorated.

In 2009, the Gender Appearance Survey found that women counsel were being briefed at a level proportionate to the number of women at the Bar (ie 19% nationally). Since then the overall number of women at the Bar has increased to 23% nationally and 21% in New South Wales. The number of women briefed in the matters surveyed for 17 months over the period July 2014 to October 2015 was 18.2% which is less than the proportion of women now at the Bar.

If the numbers for the Court of Criminal Appeal are excluded from the survey, then the picture is particularly bleak – women barristers appear in 16% of matters with 2% silks and 14% juniors.

Kate Eastman SC

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Any errors or omissions are my own.